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No. 85-639

In The

Supreme Court of the United States

October Term, 1985

DESERT OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

NAEGELE OUTDOOR ADVERTISING CO. OF CALIFORNIA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Morongo Band of Mission Indians is a sovereign, federally recognized Indian tribe and beneficial owner of the Morongo Reservation. *See Morongo Band of Mission Indians v. Area Director, Sacramento Office*, 7 Interior Board of Indian Appeals 299, 86 Int. Dec. 680, 681-82 (1979) (Morongo) (Appendix 1 hereto). The reservation was created between 1876 and 1948 by a series of seven executive orders, one presidential proclamation, one federal statute and one deed. Pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712, the federal government holds it in trust "for the sole use and benefit of the band or village . . .," to be conveyed at the termination of the trust "free of all charge or incumbrance whatsoever. . . ."

The reservation lies astride a pass between the San Bernardino and San Jacinto Mountain Ranges. Its few natural resources yield little income. Its economy is depressed and many of its members are unemployed and live in poverty. Less than one square mile of its 32,254 acres is suitable for economic development. *Morongo, supra*, 86 Int. Dec. at 681. This small area is a strip of land that flanks Interstate Highway 10, which passes across the southern part of the Morongo Reservation and is the major east-west artery for travel to and from metropolitan Southern California. *Id.*

The Band has long derived a major part of its income from outdoor advertising. In 1963 the Band's general membership delegated to the Morongo Tribal Council authority to negotiate outdoor advertising agreements. In a 1977 appraisal report the Southern California Ap-

praisal Office of the Bureau of Indian Affairs (BIA) identified outdoor advertising as "the highest and best use of [the] reservation land along Interstate 10." *Morongo, supra,* 86 Int. Dec. at 681 n. 3.

In 1977 the Band solicited proposals for further outdoor advertising from several outdoor advertising businesses. *See People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.,* 38 Cal. 3d 509, 513 (1985) (Naegele). On the basis of the more favorable terms offered by the Naegele Outdoor Advertising Company of California, Inc., the Band negotiated a lease with Naegele. Since 25 U.S.C. § 415 and former 25 C.F.R. § 131 (now codified as 25 C.F.R. § 162) required the approval of the Department of Interior for such leases, the Band and Naegele submitted the lease to the local Bureau of Indian Affairs (BIA) office for approval. That office disapproved the lease on the ground that it violated the Federal Highway Beautification Act of 1965 (Pub. L. 89-285, codified as amended at 23 U.S.C. §§ 131, 136 & 319) and the California Outdoor Advertising Act (1970 Cal. Stats., ch. 991 § 2 at 1764, codified as amended at Cal. Bus & Prof. Code §§ 5200 *et seq.*). On March 14, 1978, the Area Director of the BIA upheld the disapproval. The Band appealed to the Commissioner of Indian Affairs, who did not act on the appeal within the 30 days required by 25 C.F.R. § 2.19(a), and the appeal was automatically referred to the Interior Board of Indian Appeals. *See* 25 C.F.R. § 2.19(b).

On December 13, 1979, the Interior Board of Indian Appeals reversed the decision of the Area Director and remanded the case to the Acting Deputy Commissioner of Indian Affairs, with instructions that the BIA "seek to

effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion." *Morongo*, *supra*, 86 Int. Dec. at 692. The Board's action was that of the highest authority within the Department of the Interior and was final for the Department. *Id.*; *see* 43 C.F.R. § 4.1.

Meanwhile, in March of 1978 the Band had enacted a land use ordinance designating the Reservation land along Interstate 10 as suitable for commercial development, and on March 30, 1978, while the Band's appeal of the Area Director's decision was still pending, the Band and Naegele entered into a written agency agreement. Pursuant to the agreement, Naegele installed and began operating 15 outdoor advertising signs on the Morongo Reservation.

Naegele paid the band $250,000 for the right to operate the signs for 10 years. The Band has used this money for fire protection, improved television reception, development of new tribal enterprises, operation of the Tribal Business Committee, and development of alternative energy sources.

On December 12, 1980, Desert Outdoor Advertising, Inc. ("Deser.") filed a first amended complaint against Naegele, alleging causes of action for nuisance, unfair competition, and intentional and negligent interference with prospective economic advantage. The Band was not named as a defendant. Naegele's demurrer was sustained as to the first and overruled as to the remaining causes of action.

Desert moved for summary judgment on the ground that the failure of the Morongo signs to comply with the

requirements of the California Outdoor Advertising Act constituted unfair competition. On September 11, 1981, the Riverside Superior Court entered summary judgment in favor of Desert on its second cause of action for unfair competition. On April 21, 1982, the Superior Court entered an amended judgment nunc pro tunc and decreed inter alia (1) that Naegele could not erect outdoor advertising signs on the Morongo Reservation unless it obtained outdoor advertising permits from the State Department of Transportation; and (2) that Naegele dismantle all of the structures that it had erected on the reservation at the Band's request. The Court stayed enforcement of its judgment pending resolution of the case on appeal.

The Fourth District Court of Appeal, Division Two, consolidated Desert's action with the parallel action by the State of California Department of Transportation (the "Department").[1] Because resolution of the issues being appealed would significantly affect the Morongo Band, the court granted the Band's application for leave to file a brief *amicus curiae.*

On February 3, 1984, after all briefs had been filed and oral argument heard, Naegele filed a motion for judicial notice, by which it apprised the appellate court that on February 2, 1984, the Acting Superintendent of the Southern California Agency of the BIA had approved the Morongo-Naegele agreement, retroactive to the date of its execution on March 30, 1978. Appendices 2 & 3 hereto. Un-

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[1] *People of the State of California, etc., Respondent, v. Naegele Outdoor Advertising Company of California, etc., et al., Appellant,* No. 4 Civ. 27494.

deterred, the appellate court affirmed the trial court's granting of summary judgment in both actions.

Naegele filed its petition for hearing with the California Supreme Court on April 9, 1984. The State and Desert filed answering briefs, and the Supreme Court again allowed the Morongo Band to file an *amicus curiae* brief.

On May 2, 1985, the California Supreme Court issued its opinion in the consolidated State and Desert actions. It held (1) that whether or not Congress intended the outdoor advertising standards of the Highway Beautification Act to apply on Indian reservations, it did not intend that these standards be enforced through the assertion of state power; (2) that the Act of August 15, 1953 (Public Law No. 83-280, 67 Stat. 589 (codified at 28 U.S.C. § 1360) (Public Law 280)) did not constitute a grant by Congress to the states of authority to regulate outdoor advertising on Indian reservations; and (3) that California's Outdoor Advertising Act was further preempted because Congress had, by the HBA, reserved to federal authorities responsibility for enforcing the Act on federal lands and reservations, or, alternatively, because the assertion by California of its outdoor advertising laws would impose inconsistent state regulations in an area reserved for federal oversight. *Naegele, supra*, 38 Cal. 3d at 514-23.[2]

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[2] On August 3, 1984, the Ninth Circuit Court of Appeals issued its opinion in *United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc.*, 739 F.2d 473 (9th Cir. 1984), *cert. denied*, 83 L.Ed.2d 779, 105 S.Ct. 785, 53 U.S.L.W. 3484 (1985), reversing the decision below and re-

(Continued on following page)

Because it had based its ruling on grounds of federal preemption, the Court expressly refrained from deciding the additional defense asserted by Naegele, to wit, that the lawsuits asserted against Naegele should be dismissed pursuant to California Code of Civil Procedure Section 389 because the Morongo Band was a necessary party that could not be joined. *Id.* at 523 n. 12.

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ARGUMENT

1. Summary Of Opposition

Desert's petition for writ of certiorari is based on four contentions, the first three of which are links in a chain and the last of which is a catch-all.

First, Desert contends that the HBA applies to all lands adjacent to the federal highway system. The California Supreme Court expressly refrained from deciding this question, preferring instead to base its decision on the less intrusive ground that whether or not the HBA applies to Indian reservations, it does not delegate authority to enforce its standards in Indian country. Desert has had

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manding with directions to dismiss the relator's action. In *Buxbom*, Seymour Buxbom, the president of Desert Outdoor, had alleged (by a complaint filed on December 3, 1982 in the Central District of California) that the March 30, 1978 Morongo-Naegele agency agreement violated 25 U.S.C. § 81. In reversing the district court's grant of summary judgment in favor of Buxbom, the Ninth Circuit held that the BIA had the power to approve the agency agreement retroactively and further held that such approval precluded any judgment that the agreement between the Band and Naegele was void.

to resurrect this issue, however, in order to argue, as it does, that the HBA did delegate the states authority to enforce its "standards" on Indian reservations.

Desert's second contention is that the HBA bifurcated responsibility for implementing its "standards" on all federal lands, including Indian reservations. In support of this contention, Desert has concocted the unlikely hypothesis that although the HBA authorized federal agencies to promulgate rules implementing the HBA, it left to the states the business of enforcing these rules. The fact that this epochal interpretation of the HBA has never occurred to any of the affected federal agencies seems not to concern Desert.

This second contention in turn accounts for the third, which is that the California Supreme Court improperly, and unnecessarily, determined that the HBA preempted whatever authority California otherwise enjoyed to regulate on-reservation outdoor advertising. Finally, Desert argues somewhat mysteriously that there is no rational relationship between the HBA and tribal sovereignty, and that whatever else Congress might have intended in enacting the HBA it could not have meant to leave Indian reservations unregulated.

Naegele respectfully submits that this Court should refuse certiorari if only because Desert's line of argument, if adopted, would require the Court to decide two complex questions, both of which the California Court's decision wisely avoids, i.e., (1) whether the HBA applies to Indian reservations and (2) what on-reservation enforcement methods the State could resort to and the extent to which such enforcement activities should be allowed to interfere

with the Interior Department's management and oversight of the leasing of Indian trust lands.

In any case, Naegele respectfully submits, none of Desert's four contentions is well taken.

Finally, the fact remains that the Morongo Band is and has always been an indispensable party to this action. This case should be dismissed for failure to join an indispensable party who cannot be joined.

2. The HBA Does Not Apply To Indian Reservations

Desert bases its contention that the HBA was intended to apply to Indian reservations on four grounds.

It first observes that Section 131(h) of the HBA provides that all "public lands or reservations" are to be "controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." However, the mere mention of "public lands or reservations" cannot by itself be a basis for inferring that Congress intended the HBA's "standards" to apply to Indian country. The unqualified phrase "public lands" refers to the undifferentiated group of federal lands that have not already been devoted to a specific public purpose (such as being used for an Indian reservation). *Missouri, Kansas & Texas Railway Co. v. Roberts*, 152 U.S. 114, 119, 38 L.Ed. 377, 14 S.Ct. 496 (1894); *Newhall v. Sanger*, 92 U.S. 761, 23 L.Ed. 769 (1876). Indian reservations are *not* "public lands." *Minnesota v. Hitchcock*, 185 U.S. 373, 395-402, 22 S.Ct. 650, 46 L.Ed. 954 (1902); *Leavenworth, L. & G.R.R. v. United States*, 92 U.S. 733, 746-47, 23 L.Ed. 634 (1875); *United States v. Schwartz*, 460 F.2d 1365, 1372 (7th Cir. 1972). Rather, they are owned beneficially by the Indians, and legal title is held in trust by the United States

Government. The Government's trust responsibility forbids that Indian reservations be treated as if they were no different than public lands. The courts therefore will not construe a federal statute applicable on its face to "public lands" as applicable to Indian reservations. *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113, 63 L.Ed. 504, 39 S.Ct. 185 (1919). Thus, merely by use of the term "public lands," Congress could not have intended to make Indian reservations subject to the HBA.

Nor can the unqualified term "reservations" by itself be construed as referring to Indian reservations. The term "reservations" has been used broadly "to describe a body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine,* 215 U.S. 278, 54 L.Ed. 195, 30 S.Ct. 93 (1909). It may include military reservations, national forests or parks, or any other federally protected reserve. Indian reservations, on the other hand, are unique, since vital rights are vested in the resident Indians and tribes. *Morongo, supra,* 86, I.D. at 687; *see* R. Strickland, et al., eds. *Felix S. Cohen's Handbook of Federal Indian Law 1982 Edition,* 220-28 (1982) (Cohen's Handbook).

Desert next argues that because a pair of United States senators grandiloquently traded assurances that "the *precise* mileage of highways . . ." to be covered by the HBA was 41,000 miles, and that "the whole of that mileage [was] proposed to be covered . . .," this Court may take it as established that Congress intended Indian reservations to be subject to the HBA's standards. *See* 3 Committee Hearing on Floor Debates, Cong. News, part 18, 89th Cong., 1st Sess., at 23874 (emphasis added). It is re-

spectfully submitted, however, that a mere numerical reference (which had obviously been rounded off to the nearest 1,000 miles), accompanied by the rhetorical flourish that this encompassed "all" of the federal highway system, is an extremely insubstantial basis on which to conclude that the HBA was intended to apply to all highways, *even* those located on Indian reservations. Here, Desert is arguing that a federal act transferred regulatory authority over Indians to the states. It is fundamental that any federal statute which would make such a jurisdictional transfer must do so in express, unambiguous language. *Bryan v. Itasca County,* 426 U.S. at 373, 392, 48 L.Ed.2d 710, 96 S.Ct. 2101 (1976).

Desert also refers to a statement of the Honorable Wayne M. Aspinall, in which the congressman noted:

> "*If* . . . [the HBA] is intended to cover, for example, Indian reservations, it should be kept in mind that such reservations are not owned by the United States . . . ." Petition at 8 (emphasis added).

Desert observes that the congressman's suggestion of an alternative phraseology, which would have expressly excluded Indian reservations, was not adopted — and from this fact concludes that Congress intended the HBA to apply to Indian lands. Obviously, however, the mere fact that Congress failed to adopt language which would have made it clear that the HBA does *not* apply to Indian reservations does not warrant the conclusion that Congress therefore intended the Act to apply to Indian reservations. At best, the legislative record, like the statute it underlies, remains ambiguous. And it is fundamental that ambiguous language

in federal statutes should be construed *in favor* of Indians, especially where it is claimed, as here, that the ambiguous statute abolishes by implication important tribal rights. *Bryan v. Itasca County, supra,* 426 U.S. at 392; *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 660-61 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038, 50 L.Ed. 2d 748, 97 S.Ct. 731 (1977).

Finally, in support of its argument that the HBA was intended to apply to Indian reservations, Desert makes reference to an associate solicitor's April 17, 1967 opinion, which concluded that the HBA was intended to apply to Indian reservations. However, as has already been pointed out, the Interior Department has since rejected that conclusion — in a final administrative decision dealing with the very signs which are the subject of this action. *Morongo, supra.* In fact, both the Department of the Interior *and* the Department of Transportation, the two federal agencies charged with responsibility for implementing the HBA on federal lands, have concluded that the HBA was *not* intended to apply to Indian reservations. *Id.,* 86 I.D. at 685-89; Fed. Hy. Ad. Memo. Jan. 21, 1976 (Appendix 4 hereto). In so concluding, both agencies placed special emphasis on the fact that the Highway Beautification Act relies on state action to enforce its standards. *Morongo, supra,* 86 I.D. at 686; Fed. Hy. Adm. Memo., *supra,* at 8 ff.; *see* 23 U.S.C. § 131(b)-(k); 23 C.F.R. §§ 750.301-308, 750.110 & 750.115. This Court should not substitute its judgment for that of these agencies if their conclusion is the result of a reasonable construction of the statute in question. *State of Wash., Dept. of Ecology v. U.S.E.P.A.,* 752 F.2d 1465, 1469 (9th Cir. 1985) (Wash. v. U.S.E.P.A.).

For all of these reasons, it is respectfully submitted that Desert's first contention, i.e., that Congress intended the HBA to apply to Indian reservations, is without merit.

3. The HBA Did Not Delegate To The States Authority To Enforce The HBA On Indian Reservations

Desert's second contention is that the HBA bifurcated responsibility for implementing its "standards" on federal lands, including Indian reservations, and specificially that it gave the states authority to enforce the HBA's standards on Indian reservations. This contention is without support for a variety of reasons.

First, the Act does not delegate any regulatory authority, whether rule-making or enforcement, over federal lands. *See* 23 U.S.C. § 131; *National Advertising Co. v. City of Ashland, Or.*, 678 F.2d 106, 108 (9th Cir. 1982); *State of South Dakota v. Adams*, 506 F.Supp. 50, 58-59 (C.D.S.D. 1980), *aff'd sub nom., South Dakota v. Goldschmidt*, 835 F.2d 698 (8th Cir. 1980), *cert. denied sub nom., South Dakota v. Lewis*, 451 U.S. 984, 68 L.Ed.2d 841, 101 S.Ct. 2316 (1981). Rather, the purpose of the statute is to induce the states to regulate outdoor advertising in a manner consistent with certain federal standards. *Markham Advertising Company v. State*, 73 Wash. 2d 405, 439 P.2d 248, 257 (1968), *appeal dismissed*, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512, *reh'g denied*, 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969) ("the purpose of the federal statute is obviously to induce the states to act, not to require them to do so"); *National Advertising Co. v. City of Ashland, Or., supra*, 678 F.2d at 108-9. The Act achieves

this goal by allowing the states to choose between compliance or foregoing ten per cent of their allotment of federal aid highway funds. 23 U.S.C. § 131(j) and (l); *see State of Vermont v. Brinegar,* 379 F.Supp. 606, 609 (D.Vt. 1974). Neither subsection (h) of Section 131, nor any other part of the HBA, constitutes a grant of jurisdiction to the states. To the contrary, the Act assumes that the states already have the authority needed to regulate outdoor advertising in the manner recommended. *State of South Dakota v. Adams, supra,* 506 F.Supp. at 59.

Desert's unlikely hypothesis that the HBA gave states enforcement jurisdiction over Indian reservations is also contradicted by the Ninth Circuit's holding in *Ryan Outdoor Advertising, Inc. v. United States,* 559 F.2d 554, 556-57 (9th Cir. 1977) (per curiam). There the appellate court held that the source of the Interior Secretary's independent authority to deviate from HBA standards was the general congressional grant of authority to the Interior Secretary to administer laws dealing with public lands. *Id.* at 556. The Secretary is the federal official charged with ultimate responsibility for administering Indian affairs; *a fortiori,* he has authority to deviate from the HBA where Indian lands are concerned; and if *he* has such authority, then the states do not.

Desert's theory of bifurcated jurisdiction is also contrary to the established rule of statutory interpretation that state laws will not be held applicable to on-reservation activities except where Congress has *expressly* provided that state laws shall apply. *Bryan v. Itasca County, supra,* 426 U.S. at 376 n. 2; *DeCoteau v. District County Court,* 420

U.S. 425, 427-28 n. 2, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1970); *see Wash. v. U.S.E.P.A., supra,* 752 F.2d at 1469-70. Where as here a general federal law would, if applied to Indians or their reservations, infringe upon a particular Indian right or policy, that law will be held not to apply to Indians on reservations unless Congress has expressly provided to the contrary. *Bryan v. Itasca County, supra,* 426 U.S. at 392; *Morton v. Mancari,* 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974); *Squire v. Capoeman,* 351 U.S. 1, 100 L.Ed. 883, 76 S.Ct. 611 (1956); 1 *Opinions of the Solicitor of the Interior Relating to Indian Affairs 1917-1974,* 1335 (May 31, 1945) (despite its declared applicability to "public and reserved lands of the United States . . ., the Boulder Canyon Project Act did *not* apply to the Morongo Indian reservation); *see United States v. Blue,* 722 F.2d 383, 385 (8th Cir. 1983); Cohen's Handbook, *supra,* at 285.

Desert's theory is also contrary to the established rule that federal legislation is not to be construed in a manner that would limit or extinguish any of the traditional prerogatives of tribal sovereignty, absent a clear expression of intent by Congress. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149-150, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982). This Court may presume that Congress intended to exercise its power in a manner consistent with the federal trust obligation. *Wash. v. U.S.E.P.A., supra,* 752 F.2d at 1470.

In support of its argument that the HBA delegated enforcement authority to the states, Desert makes much of the fact that the HBA of 1965 did not repeat word-for-word certain language in the Federal Aid Highway Act of 1958, which had directed the Secretary of Commerce to

make whatever agreements were necessary with the federal agencies having jurisdiction over public lands or reservations, to ensure that that 1958 Act's purpose was realized. From the failure of the 1965 HBA to reiterate this language, Desert would have this Court believe that Congress had "changed its *entire philosophy* . . ." and "[drawn] *the distinction between* the applicable *standards* governing billboard advertisement on Interstate and primary highways on the one hand *and enforcement* of those standards on the other hand." Petition at 10-11 (emphasis added). This argument assumes as its premise that Congress had an almost neolithic grasp of our mother tongue, i.e., that Congress was incapable of saying plainly what Desert was quite able to say in the above-quoted passage. It also announces as a *fait accompli* a shocking and unprecedented shift in the balance of power between state and federal governments. Henceforth, according to Desert, the states shall have unfettered authority to enter all federal reservations, military and Indian alike, in pursuit of deviant billboards.

Naegele respectfully submits that Desert's argument that the HBA impliedly granted the states enforcement jurisdiction over all on-reservation outdoor advertising activities is without merit.

4. The California Supreme Court's Preemption Holding Was Correct

The State Supreme Court held that California's claimed authority to regulate on-reservation outdoor advertising was preempted on two grounds, both of which fell under the rubric of those "familiar principles of pre-emption" referred to by this Court in its opinion in *New Mexico v. Mescalero Apache Tribe, supra,* 462 U.S. at 333-34. The

State Court first held that the HBA clearly manifested Congress's intent to design a comprehensive scheme for regulation of outdoor advertising, and then found that the Act expressly "reserved to federal authorities the responsibility for enforcing the [A]cts provisions upon federal lands and reservations." It is this conclusion that Desert has attempted to discredit by its far-fetched theory of bifurcated jurisdiction. For the reasons already set forth above, that contention is unsupportable.

However, even assuming for the sake of argument that Desert's theory of bifurcated jurisdiction is correct, the California Supreme Court adduced an *additional* reason why state jurisdiction over on-reservation outdoor advertising would in any case be preempted, namely, the fact that Congress and the executive branch have by numerous enactments and regulations indicated unambiguously that regulation of tribal enterprises like this one is within the exclusive jurisdiction of the Interior Department. *Naegele, supra*, 38 Cal.3d at 522 & n.9. In support of this conclusion, the Court referred briefly to the fact that "Interior's authority to supervise the enterprise at issue here cannot be doubted," citing 25 U.S.C. § 415(a) and 25 C.F.R. § 162. To this list, the Court could have added, had it wanted to, the actual approval by the Secretary of the Interior of the Morongo-Naegele lease agreement (Appendices 2 & 3 hereto), 25 U.S.C. § 81 (which governs all contracts between Indians and non-Indians), the decision of the Interior Department in *Morongo*, and the numerous congressional and executive pronouncements establishing the firm federal policy of encouraging tribal sovereignty and economic self-development.

Desert has not even addressed, much less attempted to discredit, this additional ground for holding that state authority to regulate on-reservation outdoor advertising is preempted by federal law.

5. Desert's Subsection D Fails To State Any Reason Why Certiorari Should Be Granted

An examination of the argument contained within subsection D of the Petition reveals that it in fact consists of several unrelated arguments.

First, Desert has posed for itself and the Court the nonsensical question whether a rational relationship exists between the HBA and the right of reservation Indians to make their own laws. As has already been explained, whether a federal statute of general application is also applicable to the on-reservation activities of Indians has nothing to do with whether there was a rational basis for the enactment of the statute. In fact, the test is considerably more stringent. *Cf. Wash. v. U.S.E.P.A., supra*, 752 F.2d at 1469-72.

Second, Desert suggests that this case poses a unique question not previously addressed by this Court, namely, whether and under what circumstances federal legislation designed to encourage state adoption of certain national standards will be deemed a cession of regulatory and enforcement jurisdiction by the federal government to the states, and in particular, whether and under what circumstances such legislation will be deemed to include a grant of state jurisdiction over Indian country. *See* Petition at 18-19. In fact, this and other courts have addressed both questions on several occasions.

The general rule is that federal legislation designed to encourage adoption of certain national standards does *not* constitute a cession of regulatory and enforcement jurisdiction by the federal government to the states, unless Congress has indicated, by "clear and unambiguous" language, that it intends this result. *See Hancock v. Train,* 426 U.S. 167, 179, 48 L.Ed.2d 555, 96 S.Ct. 2006 (1976) (interpreting § 118 of the Clean Air Act, 42 U.S.C. § 1857-(f)); *E.P.A. v. State Water Resources Control Board,* 426 U.S. 200, 220-21, 48 L.Ed.2d 578, 96 S.Ct. 2022 (1976) (interepreting § 313 of the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §1323). It is clear from the face of the HBA that it contains no "clear and unambiguous" grant of regulatory authority to the states.

As the California Supreme Court pointed out in *Naegele,* the Ninth Circuit Court of Appeals recently had occasion to address this question in the context of a claimed delegation of state enforcement jurisdiction over Indian lands. *Naegele, supra,* 38 Cal. 3d at 519 n. 5. In *Wash. v. U.S.E.P.A., supra,* 752 F.2d 1465, the Ninth Circuit upheld the EPA's conclusion that the federal Resource Conservation and Recovery Act (RCRA) "does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty," even though Indian tribes are clearly regulated entities under RCRA and the Act authorizes state regulation in lieu of the federal program. *Naegele, supra,* 38 Cal.3d at 519 n. 5. This by itself is sufficient to dispense with Desert's second argument under subsection D of its Petition.

Desert's third argument under subsection D is, apparently, that the only conduct to be regulated here is the on-reservation conduct of non-Indians. This statement is simply incorrect. The preceding statement of facts makes it abundantly clear that the signs at issue are owned by the Morongo Band and located on the reservation. The on-reservation conduct of Indians is therefore in issue.

Desert's fourth argument in subsection D of its Petition is, in effect, that in light of the HBA's salutary purpose, it is difficult to imagine that Congress intended to leave Indian reservations in their "distressed condition," that is, without the benefit of regulation by the State of California. Petition at 20. The simplest and most direct answer to this argument is that it is irrelevant (because the language of the HBA does not expressly and unambiguously confer regulatory jurisdiction on the State of California), although one might equally well respond that Congress clearly has left to the Interior Department responsibility for implementing the HBA's standards on Indian reservations.

Desert next argues that the off-reservation "spillover" effect of billboards is "total." However, as is pointed out above, the stretch of Interstate 10 involved in this case is located entirely on the Morongo Reservation. Desert's citation of *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983) is inapposite because, as the California Supreme Court noted, *Rice* involved a situation where the federal statute in question expressly provided for the application of state law. *Naegele, supra*, 38 Cal. 3d at 521.

Finally, Desert argues that there is no tradition of tribal immunity that would be threatened by allowing state jurisdiction over on-reservation outdoor advertising. Basically, this is a misplaced preemption-balancing argument. It is wrong for two reasons. First, as the preceding discussion shows, the right of Indian tribes to control reservation land use is a fundamental and vital attribute of tribal sovereignty. Further, as the Ninth Circuit recently noted, there is also a strong "federal commitment to tribal self-regulation in environmental matters." *Wash. v. U.S.E.P.A.*, *supra*, 752 F.2d at 1471. Second, the fact that outdoor advertising is not an ancient custom simply is not and cannot be a basis for concluding that the Band does not have a protectible sovereign interest in engaging in this enterprise. Desert's argument utterly fails to take account of the direction of all federal Indian policy since the Indian Reorganization Act of 1934 — which has been to encourage development of reservation-based business enterprises. If Desert's argument holds water, then by the same token the Jicarilla and Crow tribes have no protectible sovereign interest in mining coal, since, obviously, there has never been a tribal tradition of coal mining. *See Merrion v. Jicarilla Apache Tribe*, *supra*, 455 U.S. at 138-152; *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1115-17 (9th Cir. 1981), *modified*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916, 103 S.Ct. 230, 74 L.Ed.2d 182 (1982).

6. The Morongo Band Of Indians Is An Indispensable Party That Cannot Be Joined, And Therefore This Action Should Be Dismissed

As already indicated, the California Supreme Court refrained from ruling on Naegele's claim that the Morongo

Band is an indispensable party that cannot be joined. Naegele again respectfully submits, however, that this action should now be dismissed for this reason.

California's Code of Civil Procedure Section 389 deals with joinder of parties and indispensable parties. In 1971 it was revised to conform substantially to Rule 19 of the Federal Rules of Civil Procedure. Code Civ. Proc. § 389, Law Revision Commission Comment, 1971 amendment. Like Rule 19, Section 389 sets forth a two-step procedure for determining (1) whether a party or entity not named as a defendant is a "necessary party," that is, one which should be "joined if feasible," and (2) if so, whether the action should be dismissed because the person not joined is an "indispensable party." C.C.P. § 389(a) & (b); *Vanoni v. County of Sonoma*, 40 Cal. App. 3d 743, 746-47, 115 Cal. Rptr. 485 (Ct. App. 1974); *cf. Bakia v. County of Los Angeles of State of Cal.*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam). Obviously, Desert is requesting relief which, if granted, would entail serious adverse consequences to the Band, to wit, (1) the invalidation of the Morongo-Naegele lease agreement insofar as it purports to authorize signs that violate the California Outdoor Advertising Act, and (2) displacement of tribal regulatory jurisdiction.

Federal decisions construing Rule 19 of the Federal Rules of Civil Procedure have found the mere possibility of such adverse consequences sufficient to make an Indian tribe a "necessary party" within the meaning of Rule 19(a). In the following cases, the courts held that an unjoined Indian tribe was a *necessary* party because the action would have had the effect of invalidating a lease or

other agreement to which the tribe was a party. *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied sub nom, Susenkewa v. Kleppe*, 425 U.S. 903, 47 L.Ed.2d 752, 96 S.Ct. 1492 (1976); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974), *cert. denied*, 420 U.S. 962, 43 L.Ed.2d 440, 95 S.Ct. 1353 (1975); *National Indian Youth Council v. Andrus*, 501 F.Supp. 649, 681-82 (D.N.M. 1980), *aff'd sub nom, National Indian Youth Council v. Watt*, 644 F.2d 220 (10th Cir. 1981); *Yazzie v. Morton*, 59 F.R.D. 377, 383 (D.Ariz. 1973). An Indian tribe is also a necessary party to any action which would limit the scope of its sovereign rights (*Northern Cheyenne, etc. v. Adsit*, 668 F.2d 1080, 1089-90 (9th Cir. 1982), *rev'd on other grounds, Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 77 L.Ed.2d 837, 103 S.Ct. 3201 (1983)), including the tribe's right to control its own reservation lands (*Yazzie v. Morton, supra*, 59 F.R.D. at 383).

Because the language and intent of Rule 19 and Section 389 are virtually the same, federal decisions construing the proper application of Rule 19 may appropriately be consulted in determining the proper application of Section 389. *Conrad v. Unempoyment Ins. Appeals Bd.*, 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803 (Ct. App. 1975). The Band must therefore be regarded as a person who, pursuant to Section 389(a), "shall be joined as a party . . . ."

The Morongo Band cannot be joined, however. It is a fundamental tenet of American Indian Law that Indian tribes enjoy sovereign immunity from suit. They cannot be sued in either federal or state court unless Congress or

the tribe consents to such suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978).

The question remaining, therefore, is whether this action should have been allowed to proceed, in spite of the fact that the Band could not be joined. Like Subsection (b) of Rule 19, Section 389(b) sets forth four criteria to be considered in determining whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." *Cf. Bakia v. County of Los Angeles of State of Cal., supra*, 687 F.2d at 301. The four considerations are:

(1) The extent to which a judgment rendered without the absentee would prejudice it or the existing party;

(2) The extent to which prejudice can be alleviated or avoided by other measures;

(3) The adequacy of a judgment rendered without the absentee; and

(4) The adequacy of plaintiff's remedies if an action is dismissed for nonjoinder. Cal. Code Civ. Proc. § 389(b).

Here, the trial and appellate courts allowed a significant infringement of the Morongo Band's inherent sovereign rights, even though the Band was not a party to the action and could not be joined. This was error. Where, as here, the validity of an important tribal agreement with a non-Indian has been attacked, the courts have not hesitated to hold that the tribe was indispensable and, therefore, that the action had to be dismissed. Each of *Lomayaktewa, Tewa Tesuque, National Indian Youth Council* and

Yazzie, was an action to invalidate a lease between a tribe and a non-Indian, and in each the court held that the tribe was an indispensable party because, among other things, cancellation of the lease would severely prejudice the interests of the tribe. Validation of a lease is not, of course, the only kind of harm which requires that a tribe be deemed indispensable. *See Northern Cheyenne, etc. v. Adsit, supra,* 668 F.2d 1080 (action involving tribal water rights).

The first of the four factors enumerated in Subsection (b) of Section 389 therefore is clearly satisfied.

The second factor under Section 389(b) is the extent to which, by protective provisions in the judgment, prejudice to the absent party can be lessened or avoided. Here, that is not possible. As the decisions below illustrate, granting relief to Desert deprives the Band of the right to determine the circumstances under which it will allow outdoor advertising on its reservation lands. The possibility of such prejudice cannot be eliminated. Therefore, dismissal is required. *See Lomayaktewa v. Hathaway, supra,* 520 F.2d at 1326.

The third factor under Section 389(b) is whether the judgment rendered in the person's absence will be adequate. Here, any judgment in the tribe's absence is for all intents and purposes unenforceable: Naegele neither owns the signs nor has authority to remove them without the consent of the Band. Further, the Band is not a party to the judgment in this action. The situation is exactly like that in *Lomayaktewa v. Hathaway, supra*, where the plaintiffs sued to invalidate a lease between the Hopi Tribe, as lessor, and a non-Indian corporation, as lessee, but did not

name the tribe as a defendant. The Ninth Circuit considered it "perfectly apparent that any judgment rendered in the Tribe's absence would not be adequate." *Id.* at 1326.

The fourth factor is the adequacy of the plaintiff's remedies if the action is dismissed. Code Civ. Proc. § 389 (b). The plain fact of the matter is that Desert has mounted an action which ought properly to have been brought against the Band, not Naegele. However, the plaintiffs are barred absolutely from suing the Band; they can no more sue the Band here than they could anywhere else. Therefore, there is no underlying enforceable right of action; dismissal effects no deprivation of a right.

Desert's entire action must be dismissed, because the Morongo Band is an indispensable party that cannot be joined.

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CONCLUSION

For the reasons stated above, Naegele respectfully submits that Desert's petition for certiorari is without merit and should be rejected, or alternatively, that the action should be dismissed for failure to join an indispensable party who cannot be joined.

Dated: November 7, 1985

Respectfully submitted,

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APPENDIX 1

ADMINISTRATIVE APPEAL OF THE MORONGO BAND OF MISSION INDIANS

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE
7 IBIA 299

Decided *December 13, 1979*

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian Reservations.

2. Act of Aug. 15, 1953—Indian Tribes: Generally

Public Law 280, 67 Stat. 588-590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation, Secretarial Order or other directive.

3. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U. S. Department of the Interior, Riverside, California, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF INDIAN APPEALS

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc. of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered Mar. 14, 1978.[1] A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on Apr. 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated Mar. 27, 1979, Acting Deputy Com-

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[1]The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated Aug. 29, 1977.

missioner of Indian Affairs Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19.[2]

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

BACKGROUND

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass between the San Bernardino and

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[2]This regulation provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

San Jacinto Mountain Ranges, only the few relatively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil tranmission [*sic*] pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic development, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10.[3] Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior

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[3]In an appraisal report dated Oct. 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation lands along Interstate 10."

pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder.[4]

DISCUSSION, FINDINGS AND CONCLUSIONS

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in *State of California v. Naegele Outdoor Advertising Co. of California, Inc.*, No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200-5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceed-

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[4]The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion: Secretarial Order of July 9, 1965. 30 F.R. 8722; Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of Aug. 29, 1977."

ing, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however, does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for over 1½ years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied.[5]

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an "agency agreement" with the Naegele Company in March 1978. This agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After

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[5]The Field Solicitor refers to another California suit. *State of California v. Hadley Fruit Co.*, Civ. No. 106415. Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 1, 1979, at 2. Appellant denies this charge and maintains that Departmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1-2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the *Code of Federal Regulations.* 43 CFR 4.350-4.353. To our knowledge, no BIA action has been taken regarding the agency agreement.[6] If some

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[6]According to the Field Solicitor, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director, for approval." Answer Brief at 2.

BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company[7]

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[7]The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele Company, dated Aug. 10, 1977, which reads as follows:

"Gentlemen:

"Confirming our meeting and proposal to the Morongo Tribal Council on Aug. 8, 1977, we would like to propose the following for your approval.

"1. We would like to lease the North side of sections 10 and 12 and the South side of section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

"2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

"3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of $6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

"4. The annual payment of $6,500 plus, will be made in annual installments in advance beginning Jan. 1, 1978. The payment schedule above will be established by the fact that

(Continued on following page)

The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor advertising is the Act of Aug. 9, 1955, 69 Stat. 539, *as*

(Continued from previous page)

we will have approval to start construction on the locations by October 1, 1977.

"5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

"6. The Hadley outdoor advertising signs can remain as far as we are concerned. But all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

"7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

"8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

"9. We will only build standardized outdoor structures, 14′ x 48′ with space for extensions, please see photo, or we will not exceed 1,200 sq. ft. which will meet state approval.

"10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

Very Truly Yours
Leon E. Howell
President"

amended, 25 U.S.C. § 415 (1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

> Prior to approval of any lease . . . the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. *See* 25 CFR 131.5.

Based on the authorities incorporated by reference in the Area Director's decision (*see* n.4), it appears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate Highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, the Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.

2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.

3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.

4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

DOES THE HIGHWAY BEAUTIFICATION ACT APPLY TO INDIAN RESERVATION LANDS?

The Highway Beautification Act of 1965, *as amended,* was enacted by Congress to provide for scenic development and road beautification of the Federal-aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976)) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131(h), the Act provides:

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated Apr. 7, 1967, the Associate Solicitor for Indian Affairs concluded that "reservations of the United States" as used in subsec. (h) of 23 U.S.C. § 131 in-

cludes Indian reservation.[8] Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way across "reservations" for canal and ditch purposes.[9] At issue was whether the term "reservations" as used in the Act of Mar. 3, 1891, § 18, 26 Stat. 1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. *United States v. Portneuf-Marsh Valley Irr. Co.*, 205 F.416 (E.D. Ida. 1913), *aff'd*, 213 F.601 (9th Cir. 1914).

As appellant argues on appeal, the Act of Mar. 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation.[10] On

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[8]In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

[9]27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 363 (1905); and 42 L.D. 595 (1913).

[10]The statutory proviso reads in pertinent part: *"Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." 43 U.S.C. § 946 (1976). With respect thereto, see 27 L.D. 421, 423-424, 33 L.D. 563, 565 and 42 L.D. 595, 600, *supra*. In *U.S. v. Portneuf-Marsh Valley Irr. Co., supra*, the Federal district court stated:

"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly." 205 F. 416, 419.

the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, *see* 23 U.S.C. § 131(b)-(k) (1976), contains no special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands managed by the Bureau of Land Management. 43 CFR 2921.0-6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Sec. 131 (d)-131(g); 23 CFR 750.301-308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Sec. 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are necessarily forsaken: first, that tribally owned Indian reservation land is not subject to state powers of eminent domain. *Minnesota v. United States*, 305 U.S. 382 (1939); *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th

Cir. 1970),[11] and second, that states are not authorized to enforce their land use regulations on Indian reservations. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975. *cert. denied,* 429 U.S. 1038 (1977).

Unquestionably, the Congress, which has plenary authority over Indian affairs, *United States v. Kagama,* 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunicated by the Supreme Court in *Williams v. Lee,* 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservations" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale for any purpose." *United States v. Celestine,* 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve.[12] Indian reservations are

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[11]Allotted lands are subject to state condemnation. Act of Mar. 3, 1901. 31 Stat. 1084, 25 U.S.C. §257 (1976).

[12]In concluding that the phrase "public lands and reservations of the United States" as found in the Act of Mar. 3, 1891, included Indian reservations, the Appeals Court noted in *United States v. Portneuf-Marsh Valley Irr. Co., supra,* that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

unique, however, since vital rights are vested in the Indians and tribes located thereon. Appellant refers to the Buck Act[13] as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act.[14]

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in sec. 131(h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated Dec. 19, 1977, an assitant [*sic*] chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within certain coverages of the Highway Beautification Act.[15]

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[13]Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104-110 (1976).

[14]4 U.S.C. § 109 (1976). See Appellant's opening brief filed July 5, 1978, at 4-7.

[15]See pp. 41-46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever. However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 *U.S. Code Cong. & Adm. News*, pp. 3710-3736.[16] As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. *See* 23 U.S.C. §§ 101(a), 103(b)(1), 120(a), 120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful satutory language must be interpreted in favor of the Indians. This is undoubtedly

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[16]The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

true with respect to Federal statutes dealing with Indians. *Worcester v. Georgia*, 31 U.S. (6 Peters) 214, 261 (1832); *Santa Rosa Band of Indians v. Kings County, supra; State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, — U.S. —, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. *See United States v. Allard*, 397 F. Supp. 429 (D. Mont. 1975); *cf. United States v. White*, 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if sec. 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

PUBLIC LAW 280 AND DEPARTMENTAL STANDARDS

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of a Secretarial Order of July 2, 1965,

published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

> Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.

The Field Solicitor points out that the above Secretarial directive has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. *County of San Bernardino v. LaMar*, 76 Cal. Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in *County of San Bernardino, supra*, noting that the United States was not a party to the litigation and had no notice of its pendency,[17] Secretary Hickel stated that,

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[17]Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental Statement in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

at most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of Aug. 15, 1953, 67 Stat. 588-590, *as amended*, commonly known as Public Law 280.[18] In 1976, the Supreme Court rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976). The Court's decision in *Bryan* is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. *Bus. and Prof. Code*, § 5464.

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[18]The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 589)." Several commentators have questioned the validity of 25 CFR 1.4 (see *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg. *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In *Norvill v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminnal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in *United States v. Marcyes,* 557 F.2d 1361, 1364, (9th Cir. 1977) indicates that such a procedure cannot be countenanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

REGULATION OF
NON-INDIAN LESSEES

[3] The most difficult question in this appeal is whether the proposed lease with the Naegele company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), that a state possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our

opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

> However, *Fort Mojave* and *Agua Caliente* are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act) against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [*Bryan, supra,* 426 U.S. at 390] over reservation lands.
>
> State laws regulating outdoor advertising, like other state zoning and land use laws, fall within *Bryan's* prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in *Williams v. Lee, supra,* and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee,[19] that its self-government would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee.[20]

EXERCISE OF SECRETARY'S AUTHORITY

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state *standards* regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, "can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own

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[19]Under the authority of the Mission Indian Relief Act of Jan. 12, 1891, 26 Stat. 712, the United States issued a patent on Dec. 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

[20]"[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians v. Kings County, supra* at 664; *see also, Bryan, supra,* 426 U.S. 388, n. 14.

actions serve to protect tribal sovereignty.[21] This can be party [*sic*] accomplished by initially acquiring the Band's consent to the use of State standards.[22]

DISPOSITION

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated Mar. 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele Company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

Wm. Philip Horton,
Chief Administrative Judge.

We Concur:

Franklin Arness,
Administrative Judge.

Mitchell J. Sabagh,
Administrative Judge.

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[21]That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n. 18.

[22]This procedure is desirable to bring the Secretarial directive of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of Apr. 11, 1968, 82 Stat. 78-80, 25 U.S.C. §§ 1321-22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18-19.

APPENDIX 2

Approved for a period of 10 years retroactive to the execution of the Agency Agreement on March 30, 1978 as entered into by Thomas Lyons, Chairman, Morongo Band of Mission Indians and Leon E. Howell, President, Naegele Outdoor Advertising Company of California, Inc.

This document is executed pursuant to Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, which specifies under Section 2.3, that the Superintendent may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Acting Superintendent, Southern California Agency, herein exercises the redelegated authority. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement, entered into by the parties on March 30, 1978.

Where references are made to the Band as to approvals, consents and authorizations, the words "and the Secretary" will be added after Band.

Approved in accordance with the letter of the Area Director, Sacramento Area Office, dated November 15, 1983, a copy of which by this reference is made a part hereof. See Exhibit "A".

Approved February 2, 1984 reactive [*sic*] to March 30, 1978.

/s/ William H. Gianelli
Acting Superintendent
Pursuant to the authority delegated by
209 DM 8, 10 BIAM 3.1, and Sacramento
Area Office Redelegation Order No. 1
(43 F.R. 30131).

APPENDIX 3

EXHIBIT "A"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Sacramento Area Office
2800 Cottage Way
Sacramento, Caliifornia 95825

(SEAL)

November 15, 1983

Barbara E. Karshmer, Esq.
Attorney at Law
925 N Street, Suite 150
Fresno, California 93721-2256

Dear Ms. Karshmer:

This refers to your letter of October 27, 1983, concerning an Agency agreement between the Morongo Band of Mission Indians and Naegele Outdoor Advertising Company. The matter was the subject of a decision from the Interior Board of Indian Appeals which held that a contemplated lease of certain lands on the Morongo Indian Reservation for outdoor advertising purposes would not be regulated by State law or the Highway Beautification Act.

Your letter requests that the Bureau of Indian Affairs seek to "effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company," as directed by the Interior Board of Indian Appeals, in the approval of the agency agreement executed between the Band and Naegele, on March 30, 1978. You further requested that said approval be issued retroactively to March 30, 1978, in view of the Interior Board of Indian

Appeals' decision and in order that the Band may attempt to persuade the Ninth Circuit Court of Appeals to remand the case of *U.S. ex rel Buxbom v. Naegele,* to the District Court for a new decision in light of the changed facts.

Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, specifies under Sec. 2.3, that the Superintendents and the Director, Palm Springs Office, may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Superintendent, Southern California Agency, by copy of this letter, is requested to exercise his redelegated authority with respect to your request. You are requested to provide the Superintendent, with the original agreement, if at all possible. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

It is suggested that where references are made to the Band as to approvals, consents and authorizations, that "and the Secretary" be added after Band.

Sincerely,
/s/ Jess T. Town
Area Director

cc: Superintendent, SCA, w/copy of incoming for action.

APPENDIX 4

Synopsis of Legal Opinion

Attorney: Marguerite L. Price

Date: Prepared Jan. 21, 1976

Signed Jan. 21, 1976

Issue: Whether § 131(h) of Title 23, United States Code, is applicable to Indian reservations, thereby providing a basis for jurisdiction to the States to enforce their respective laws, regulations, and rules promulgated pursuant to § 131, et seq., on Indian reservations.

Conclusion: Although statutory construction leads us to the conclusion that Indian reservations are technically within the meaning of the phrase "reservations of the United States" as used in P.L. 89-285, Highway Beautification Act of 1965, 79 Stat. 1028, failure of the Act to delegate either to the Federal Highway Administration, Department of Transportation, or to the Department of the Interior, the explicit authority to implement the Act on Indian reservations results in nonapplicability to Indian reservations due to: a. Lack of uniform civil jurisdiction of the States over Indian reservations, thereby resulting in irregular exercise of the States' police power through their zoning ordinances; b. Lack of authority of the States to condemn Indian reservation land; and c. Lack specific delegation by Congress to any Federal agency or department the necessary authority and jurisdiction to implement the Act on Indian reservations. The most logical and practical solution to this dilemma is for Congress to amend the Act to delegate specific jurisdiction and authority to an appropriate governmental agency to achieve uniform implementation of the Beautification Act on Indian reservations.

Applicable Statutes:

23 U.S.C. § 131, et seq.

25 U.S.C. §§ 311, 357, 1321-1326

28 U.S.C. § 1360 [Civil jurisdictions of States over Indians]

18 U.S.C. § 1162 [Criminal jurisdiction of States over Indians]

United States Constitution, Art I, sec. 8, cl. 3

Applicable Regulations:

23 CFR 750 Subpart D (1975)

Administrative Directives:

None

Precedent Opinions and Decisions:

Worcester v. Georgia, 31 U.S. 515 (1832)

United States v. Kagama, 118 U.S. 375 (1886)

Stone v. United States, 506 F. 2d 561 (C.A. 8, 1974), cert. den., 95 S. Ct. 1405 (1975)

Hamilton v. MacDonald, 503 F. 2d 1138 (C.A. 9, 1974)

Ortiz - Barraza v. United States, 512 F. 2d 1176 (C.A. 9, 1975)

Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F. 2d 1095 (C.A.D.C. 1974), cert. den., 95 S. Ct. 1351 (1975)

Littell v. Nakai, 344 F. 2d 486 (C.A. 9, 1965), cert. den., 382 U.S. 986 (1966)

Iron Crow v. Oglala Sioux Tribes of Pine Ridge, Res., 231 F. 2d 89 (C.A. 8, 1956)

United States v. Blackfeet Tribe of Blackfeet Ind. Res., 364 F. Supp. 192 (D. Mont. 1973)

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876)

Dick v. United States, 208 U.S. 340 (1908)

Shoshone Tribe of Indians v. United States, 294 U.S. 476 (1937)

Choate v. Trapp, 224 U.S. 665 (1912)

Matter of Huff, 197 U.S. 488 (1905)

Groundhog v. Keeler, 442 F. 2d 674 (C.A. 10, 1971)

Confed. Salish & Koatenai Tribes v. State of Montana, 392 F. Supp. 1325 (D. Mont. 1975), U.S. App. Pndg., 44 L.W. 3005

Confed. Salish & Koatenai Tribes v. Mamen, 380 F. Supp. 452 (D. Mont. 1974)

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973)

Aqua Caliente Band of Mission Ind. v. County of Riverside, 306 F. Supp. 279 (C.D. Calif. 1971), aff'd., 442 F. 2d 1184 (C.A. 9, 1971), cert. den., 405 U.S. 933, reh. den., 405 U.S. 1033 (1972)

Hallowell v. United States, 221 U.S. 317 (1911)

Nadeau v. Union Pacific R.R. Co., 253 U.S. 442 (1920)

United States v. Osage County, 251 U.S. 128 (1919)

Exparte Webb, 225 U.S. 663 (1912)

Blackfeather v. United States, 190 U.S. 368 (1903)

Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)

Lone Wolfe v. Hitchcock, 187 U.S. 553 (1903)

United States v. Creek Nation, 295 U.S. 103 (1935)

United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D. S.D. 1958), dism., 259 F. 2d 271 (C.A. 8, 1958)

United States v. 10.69 Acres of Land, Yakima County, 425 F. 2d 317 (C.A. 9, 1970)

F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960)

Seneca Nation of Indians v. United States, 338 F. 2d 55 (C.A. 2, 1964)

United States v. 687.30 Acres of Land, State of Neb., 319 F. Supp. 128 (D. Neb. 1970)

Bennett County, South Dakota v. United States, 394 F. 2d 8 (C.A. 8, 1968)

Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y., 414 U.S. 661 (1974)

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"The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 *Harvard Law Review* 1344 (1969)

"The Constitutional Rights of the American Tribal Indian," 51 *Virginia Law Review* 122 (1965)

Discussion: Indian reservations, that is, those lands held in trust by the United States for the beneficial use of the Indians, are interpreted to be within the meaning of the term "public lands and reservations" of 23 U.S.C. § 131(h). Section 131(h) provides for the application of control of outdoor advertising to:

> (h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

Support for this interpretation is lent from 23 U.S.C. § 101(a) which defines "Indian reservation roads and bridges" as:

> The term "Indian reservation roads and bridges" means roads and bridges, including roads and bridges on the Federal-aid systems, that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to

> fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

An Indian reservation has been described as land set aside from the public domain which the Indians have the right to use while the fee title is in the Federal Government:

> *** An Indian reservation is simply a part of the public domain set aside by proper authority for use and occupation by a group of Indians***.*** [*Federal Indian Law,* p. 20]

Similarly, the Department of the Interior also interprets that the term "reservation" includes by definition Indian reservations. (See attached memorandum by Richard F. Allan, Associate Solicitor, Indian Affairs, April 7, 1967.) However, we do not believe that inclusion of the term thereby delegates adequate jurisdiction and authority to any Federal governmental agency to implement the Beautification Act on Indian reservations. This is true despite our agreement with the statement (memorandum, p. 1): "Manifestly, these goals will be frustrated if some areas adjacent to highways, *viz.*, Indian reservations, are exempt from the provisions of the act." But endorsement of the Act by the Department of the Interior is insufficient to confer the necessary jurisdiction to implement the Act on Indian reservations. A review of the legislative history reveals an absence of pertinent and specific discussion by either the House or the Senate on § 131(h).

Nature and origin of Federal jurisdiction: However, the mere interpretation that § 131(h) includes Indian reserva-

tions within its provisions is an inadequate basis to answer the issue of whether or not § 131(h) empowers the States to enforce their respective laws, regulations, and rules regulating outdoor advertising over Indian reservations pursuant to 23 U.S.C. § 131. Due to the quasi-sovereign nature of Indian tribes and the "plenary" power of Congress over the Indians is is concluded that § 131(h) does not confer the necessary jurisdiction over Indian reservations to enable the States to regulate outdoor advertisinig on Indian reservations. Consideration of the origin of Congressional power over American Indians is helpful in understanding the semi-independent nature of Indian tribes and the comprehensive jurisdiction of Congress over Indian tribes.

A federally recognized Indian tribe has all the inherent rights of sovereignty as a quasi-sovereign nation except when limited by the United States. *Worcester v. Georgia*, 31 U.S. 515 (1832); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *United States v. Kagama*, 118 U.S. 375, 381 (1886); *Stone v. United States*, 506 F.2d 561, 563-564 (C.A. 8, 1974), cert den., 95 S.Ct. 1405 (1975); *Ortiz-Barraza v. United States*, 512 F. 2d 1176, 1179 (C.A. 9, 1975); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F. 2d 1095, 1097 (C.A.D.C.,1974), cert. den., 95 S. Ct. 1351 (1975); *Littell v. Makai* 344 F. 2d 486, 488 (C.A. 9, 1965), cert den., 382 U.S. 986 (1966); *Iron Crow v. Oglala Sioux Tribes of Pine Ridge Res.*, 231 F. 2d 89, 91-94 (C.A. 8, 1956); *United States v. Blackfeet Tribe of Blackfeet Ind. Res.*, 364 F.Supp. 192, 195 (D. Mont. 1973). Only one provision of the United States Constitution specifically grants Federal authority over Indian tribes, that is, the regulation of commerce. U.S. Const., Art. I. Sec. 8, cl. 3. See *United*

States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876); *Dick v. United States,* 208 U.S. 340 (1908).

While Federal authority as exercised by Congress is subject to the limitations of the Constitution, such authority is generally described as "plenary." *Shoshone Tribe of Indian v. United States,* 294 U.S. 476 (1937); *Choate v. Trapp,* 224 U.S. 665 (1912); *Matter of Huff,* 197 U.S. 488 (1905); *Groundhog v. Keeler,* 442 F. 2d 674, 678 (C.A. 10, 1971); *Confed. Salish & Kootenai Tribes v. State of Montana,* 392 F. Supp. 1325, 1328 (D. Mont. 1975), U.S. App. Pndg. 44 L.W. 3005; *Confed. Salish and Kootenai Tribes v. Mamen,* 380 F. Supp. 452, 463. (D. Mont. 1974); *Agua Caliente Band of Mission Ind. v. County of Riverside,* 306 F. Supp. 279, 282-283 (C.D. Calif. 1971), aff'd., 442 F. 2d 1184 (C.A. 9, 1971), cert. den., 405 U.S. 933, reh. den., 405 U.S. 1033 (1972); *United States v. Blackfeet Tribe of Blackfeet Ind. Res.,* 369 F. Supp. 562 (D. Mont. 1973). Regulation by the Federal Government does not require the consent of Indian tribes. *Federal Indian Law,* pp. 26-27. Furthermore, Congress has exclusive control over public domain and other property belonging to the United States unless it specifically delegates the sharing of such jurisdiction to the States. See *Hallowell v. United States,* 221 U.S. 317, 323-324 (1911); *Federal Indian Law,* p. 32; *Hamilton v. MacDonald,* 503 F.2d 1138 (C.A.9, 1974).

Necessity for the Exercise of Eminent Domain Power: In order to enforce the policies of the Federal Highway Administration regarding the regulations on outdoor advertising signs, a state is to exercise its power of eminent domain as necessary pursuant to 23 CFR Subpart D Section 750.301, et seq.:

> Section 750.301 To prescribe the Federal Highway Administration (FHWA) policies relating to Federal participation in the costs of acquiring the property interests necessary for removal of non-conforming advertising signs, displays and devices on the Federal-aid primary and Interstate Systems, including tool sections on such systems, regardless of whether Federal funds participated in the construction thereof. This regulation should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g).

But only the Federal Government can exercise power of eminent domain over Indian reservations or otherwise dispose of tribal property. States do not have such power over Indian reservation lands in their own right. Traditionally, Congress has not hesitated to exercise its plenary power over tribal property. See *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442 (1920); *United States v. Osage County*, 251 U.S. 128 (1919); *Exparte Webb*, 225 U.S. 663 (1912); *Choate v. Trapp*, 224 U.S. 665 (1912); *Blackfeather v. United States*, 190 U.S. 368 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

A corrollary to the principle of Congress' plenary power over tribal land is that such control over Indian land is political in nature and may not be exercised by the courts. See *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 565 (1903). However, the term "plenary authority" has been interpreted to be something less than absolute control without compensation to the Indians for land acquired according to the Supreme Court in *United Statecs v. Creek Nation*, 295 U.S. 103, 110 (1935):

> It [plenary power does] not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation for

> them; for that "would not be an exercise of guardianship, but an act of confiscation."***

In the construction of public highways by the State through Indian reservation lands or allotted land over which the allottee does not have full power of alienation, Federal jurisdiction still prevails and the State must seek permission to build the highways from the Secretary of the Interior, 25 U.S.C. 311:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highway, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

While the authority per se of the Federal Government to exercise its power of eminent domain for public purposes over Indian reservations is widely recognized, there have been diverse opinions rendered as to whether or not the Federal authorizing statutes must specifically include Indian reservations. In *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 196 (D. S.D. 1958), dism., 259 F. 2d 271 (C.A. 8, 1958). The district court granted the Tribe's motion to dismiss the Federal condemnation suit for the acquisition of a portion of the Standing Rock Indian Reservation for the Oahe Dam and Reservoir Project in the absence of specific authorizing legislation. However, on appeal by the United States, the appellate court vacated the judgment and remanded the case to the district court with directions to dismiss it as moot.

The Ninth Circuit has held that Indian lands may be acquired by a general authorization statute without making a specific reference to Indian lands in *United States v. 10.69 Acres of Land, Yakima County,* 425 F. 2d 317, 320 (C.A. 9, 1970). In so ruling the appellate court relied on *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99, 116-120, (1960); *Seneca Nation of Indians v. United States,* 338 F. 2d 55, 56-57 (C.A. 2, 1964).

> ***Congress need not itself specifically and expressly authorize by "special enactment" each particular taking of Indian land, but can choose to delegate some of its authority to admiinstrative offices and agencies. *** *Seneca Nation of Indians, supra,* pp. 56-57.

In the *Yakima County* case, *supra,* the appellate court held that only the Secretary of the Department of Transportation may acquire Indian trust lands for public highway purposes and only after complying with certain administrative procedures as provided for in 23 U.S.C. Section 107(d) and 317. Clearly, by inference the Court believes acquisition of land held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation to have been beyond the jurisdiction and authority of the State of Washington. *10.69 Acres of Land, Yakima County, supra,* pp. 18-19. See *United States v. 687.130 Acres of Land, State of Neb.* 319 F.Supp. 128, 113 (D. Neb. 1970). In *Bennett County, South Dakota v. United States,* 394 F. 2d 8, 15-16 (C.A. 8, 1968), the court admonished the County for not seeking the required permission of the Secretary of the Interior pursuant to 25 U.S.C. Section 311 and 357 rather than attempting to acquire land within and Indian reservation strictly on its own authority. The Supreme Court ruled that certain land

owned in fee simple by the Tuscarora Indian Nation could be acquired and flooded for a storage reservoir needed in conjunction with a hydraulic power project by the Power Authority of the State of New York pursuant to a license granted it by the Federal Power Commission in accordance with 16 U.S.C. § 836a. It held that the term "reservation" in the Federal Power Act, § 3(2), as amended, 16 U.S.C. § 796(2) includes only these lands owned by the United States. *Tuscarora Indian Nation, supra.* While it should be distinguished that the reference was to those interests held in fee simple by the Indians, the Federal Power Act specially provided for the use of property owned by the United States. When such property was needed "reasonable annual charges" were to be paid to the United States pursuant to 16 U.S.C. § 803(e). The Supreme Court inferred that the Act did not authorize the condemnation of any lands or interests owned by the United States, but only because of the provision for the annual charges. However, 23 U.S.C. § 131; et seq., neither authorizes the States to acquire any Indian reservation land nor delegates such authority to any Federal agency. Certainly, the statement of Federal participation in the cost of paying just compensation for the removal of signs by the States, 23 U.S.C. § 131(g) cannot be interpreted as either expanding the States' power of eminent domain or authorizing acquisition of signs on federally owned land.

Lack of Uniform Civil Jurisdiction of the States over Indian Law Reservations: Traditionally, the scope of civil jurisdiction and authority of the States over Indian reservation lands has been quite limited. This restrictive interpretation of the State's jurisdiction is based on two theories: 1. The concept that the existence of jurisdiction over Indian reservation lands in the Federal Govern-

ment precluded the States from having such jurisdiction; and 2. Indian tribes were considered to be semi-sovereign nations. The following explanation of the origin of the preemption theory was given in *Federal Indian Law*, p. 3:

> The fact that Indian tribes are largely exempt from the operation of local law derives from the fact that the Constitution of the United States rests in the National Government rather than in the States he three powers upon which the law pertaining to Indian affairs is primarily based—the warmaking power [Constitution, art. I, sec. 8, cl. 11], the treaty making power [Constitution, art. II, sec. 2, cl. 2], and the power to regulate commerce [Constitution, art. I, sec. 8, cl. 3] with Indian tribes.*** [Footnote omitted.]

Eleven States initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their State constitutions at the time they received statehood. This disclaimer, however, is not to be interpreted as a total disclaimer of jurisdiction over the actions of Indians. These States are:

1) *Alaska:* Ala. Const., Art. 12 § 12; Enabling Act, 72 Stat. 339 § 4, as amended, 73 Stat. 141.

2) *Arizona:* Ariz. Const., Art 20; Enabling Act, 36 Stat. 568; § 19; Joint Resol., 37 Stat. 39; Pres. Procl. 37 Stat. 1728.

3) *Idaho:* Ida. Const., Art 21 § 19; Enabling Act, 26 Stat. 215.

4) *Montana:* Mont. Const., Ord. I § 2, Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl. 26 Stat. 1551.

5) *New Mexico:* N. Mex. Const., Art 21 §§ 2 and 10; Enabling Act, 36 Stat. 557; Joint Resol., 37 Stat. 39; Pres. Procl., 37 Stat. 1723.

6) *North Dakota:* N. Dak. Const., Art. 16; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1548.

7) *Oklahoma:* Okla. Const., Art. I. § 3; Enabling Act, 34 Stat. 267 §§ 1, 2, and 3; Pres. Procl., 35 Stat. 2160.

8) *South Dakota:* S. Dak. Const., Art. 22 § 2; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1549.

9) *Utah:* Utah Const., Art. 3; Enabling Act, 28 Stat. 107 § 3; Pres. Procl., 29 Stat. 876.

10) *Washington:* Wash. Const. Art. 26; Enabling Act, 25 Stat. 676; Pres. Procl., 26 Stat. 1552.

11) *Wyoming:* Wyo. Const., Art. 21 § 26; Enabling Act, 26 Stat. 222.

Specific subsections (d) and (1) of 23 U.S.C. 131 refers to "zoned commercial and industrial areas" and "unzoned commercial and industrial areas" in regard to the control of outdoor advertising. Regulation of land use through zoning ordinances is a function of the States' police power. By the terms of § 131, it is intended that its provisions be applied in conjunction with certain designated zoned and unzoned areas adjacent to the Interstate and primary systems as further specified. In order for States to enforce effectively their respective laws, regulations, and rules controlling outdoor advertising on Indian reservations, they must first have and exercise jurisdiction over Indian reservation lands. Obviously, a serious problem of uniform implementation of the provisions of § 131, et seq., arises in view of the States which specifically disclaimed such jurisdiction.

In 1953, Congress enacted Public Law 280, 67 Stat. 588, (see 28 U.S.C. 1360 and 18 U.S.C. 1162) conferring civil and criminal jurisdiction respectively upon those States which were willing to assumed [*sic*] responsibility for the Indians in place of the Federal Government. Originally,

consent of the affected Indian tribes was not required. The jurisdictional was [*sic*] grant was limited, though, to the extent that its exercise was to be subordinate to and compatible with Federal treaties, agreements, statutes, or regulations concerning Indians "in areas of Indian country." 28 U.S.C. 1360(b) specifically prohibits "alienation, encumbrance, or taxation of any real or personal property including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States***." See 18 U.S.C. § 1162 (b). There are differing judicial decisions as to whether the civil jurisdiction granted in 28 U.S.C. 1360 includes the police power of a State to impose its zoning ordinances on Indian reservations. The Washington Supreme Court did not believe that such police power was granted. *Snohomish County v. Seattle Disposal Co.*, 425 F. 2d 22 (1967), cert. den. 389 U.S. 1016 (1967).

The State of California assumed civil and criminal jurisdiction pursuant to Public Law 280 and maintained that counties have the right to impose their zoning ordinances over Indian reservations. Thus, in *Aqua Caliente Band v. City of Palm Springs*, 347 F. Supp. 42 (C. Calif. 1972), the district court held that the City of Palm Springs legally incorporated certain Indian reservation land into the city and that the City's zoning ordinances were applicable to Indian lands. However, one of the cases which the court relies on heavily was later dismissed for lack of a true case or controversy. See *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 376 (S.D. Calif. 1971), dism'd., 491 F. 2d 9 (C.A. 9, 1974). However, in this later case, the appellate court did not directly address

itself to the issue of the legality of the scope of the State assertion of jurisdiction over Indian reservations. Instead, the three consolidated cases were reversed and the complaints dimissed for lack of proper jurisdiction either by the district court or the appellate court.

To date, only six states have assumed civil and criminal jurisdiction over Indians on Indian reservations pursuant to 28 U.S.C. § 1360; 18 U.S.C. § 1162. They are: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska had previously disclaimed jurisdiction over Indian lands, however. Whether Public Law 280 was intended to extend the States' jurisdiction land was discussed in *Agua Caliente Band, supra,* p. 51 and the district court held that such jurisdiction was properly exercised by the State of California since the particular zoning ordinance in question did "not constitute any illegal interference with tribal sovereignty." However, the general rule remains well established that in the absence of Federal statutory guidance, only Federal statutory and judicial law applies to Indian reservations. *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 170-171, (1973). This rule is applicable to the original thirteen States, even these States in some instances executed treaties with Indian tribes prior to the United States doing so. *Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y.,* 414 U.S. 661, 674 (1974).

> On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 65 S. Ct. 989, 991, 89 L.Ed. 136, (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Marshall held that Indian nations were "distinct political communities, having terri-

> torial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. Worcester v. Georgia, 6 Pet. 575, 557, 8 L.Ed. 483 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that State law could have no role to play within the reservation boundaries.*** *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 168, 93 S. Ct. 1257, 1260 (1973).

It is noted that in 1968, Congress repealed § 7 of Public Law 280 providing for the consent of Indian tribes to the assumption of criminal and civil jurisdiction over them, 25 U.S.C. § 1323(b), Public Law 90-284, 82 Stat. 79. Specific Federal deposition of certain Indian trust lands, allotted lands, and trust funds and the scope of Federal jurisdiction over various Indian tribes are set forth in 25 U.S.C. §§ 541-998.

In consideration of the aforementioned problems connected with the lack of uniform jurisdictinon, and specific rejection of jurisdiction in some instances, over Federal Indian reservation lands, we conclude that the penalty for noncompliance with the provisions of the Highway Beautification Act, 23 U.S.C. § 131(b), of a 10 per centum reduction of Federal-aid highway funds cannot be applied against those States which are otherwise in compliance with the Act. However, the States should be encouraged to the greatest extent practicable to seek and coordinate voluntary compliance by Indian tribes with the provisions of the Act. We further suggest that the States explore the possibility of obtaining Federal funding for such voluntary compliance.

In summary, we believe that the complexity of the problem of implementing the Federal provisions controlling outdoor advertising, 23 U.S.C. § 131, et seq., can best be solved by an act of Congress specifically making these provisions applicable to Indian reservations. Therein, jurisdiction could be designated to a Federal agency enabling it to designate land use analoguous to zoning ordinances, if necessary, and to acquire signs as needed through the exercise of eminent domain power. Separate approprations could be included for the costs to be incurred, especially for the just compensation of sign owners since it is unlikely that the various Indian tribes residing on reservation are either capable or willing to participate in the costs.

Prepared by:

/s/ Margarite L. Price
Date: January 21, 1976

Concur:

Date: _____

Adopted by:
Chief Counsel

Date: _____